IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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No. 71-1166

JOHN ORMENTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM C. ERBECKER
129 East Market
Hornblower Building
Indianapolis, Indiana
Counsel for Petitioner,
John Ormonto

Washington, D. C. THIEL PRESS 202 393 0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	33
CONCLUSION	49
APPENDIX A, Interrogatories	1a
APPENDIX B, Opinion Second Circuit	1b
APPENDIX C, Petition for Rehearing	1c
APPENDIX D, Order Denying Petition for Rehearing	1d

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Petitioner John Ormento prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered October 29, 1971.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, is printed as Appendix A and annexed to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1971. Petitioner's Petition for Rehearing was denied on December 1, 1971. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court properly overruled, without a hearing, a motion to vacate and set aside a sentence of forty years on the ground that the issues presented therein were litigated but where the record and files conclusively show they were never raised in the trial court and never presented for review. Can such preclusion of these unlitigated issues be justified here under what appears to be the sole test laid down by Section 2255, i.e., was such denial justified on the theory that "the motion and files and the records of the case conclusively show that the prisoner is entitled to no relief"? (28 U.S.C. § 2255.)

2. In view of the 49 page Affidavit of Bias and Prejudice of Petitioner, John Ormento, made pursuant to Title 28, Section 144, was it error for the Hearing Judge to refuse to disqualify himself for all purposes, including being a material witness within the meaning of 28 U.S.C. § 455, on the ground that, *inter alia*, the certificate of good faith was made by an attorney who is not a member of the bar of the Court in which the case is being heard?

3. (a) Did the trial court in granting without a hearing and without previously having decided the question raised in the motion to withdraw as judge, the motion of the Government to strike Petitioner Ormento's interrogatories?

(b) Furthermore, did the trial court err in its opinion that interrogatories are improper in a Section 2255 proceeding in contravention of the prescriptions of *Kaufman v. United States*, 394 U.S. 79.

STATUTES INVOLVED

The statutory provisions involved are Title 28 § 455, Title 28 § 255, Title 28 § 144, and the Fifth and Eighth Amendments to the Constitution of the United States. They are printed in Appendix E, infra, p. 00.

STATEMENT OF THE CASE

Petitioner and twelve co-defendants were convicted by a jury in the United States District Court for the Southern District of New York of conspiracy involving narcotics. Petitioner was sentenced to a term of 40 years of imprisonment and fined $20,000.00.

The Court of Appeals for the Second Circuit affirmed the conviction of petitioner and he now brings this Section 2255 Petition charging certain illegal infirmities in said conviction.

On the ____ day of December, 19__, Petitioner filed his verified Petition to Vacate and Set Aside Judgment of Conviction pursuant to Title 28 § 2255, pertinent excerpts of which are printed as Appendix __ and annexed to this Petition.

The evidence against Petitioner was very flimsy but, in this § 2255 Petition, he presents new material which was not heretofore presented and adjudicated. He, therefore, challenges the validity of his conviction in this § 2255 Petition which is the first post-conviction filed in this cause. This Petition, inter alia, presents numerous legal questions but he relies upon only three which are presented in this Petition.

The Court of Appeals for the Second Circuit affirmed the convictions of petitioner and eight of the defendants. As to one defendant (Salvatore Panico), the Court reversed and granted a new trial. As to the remaining three, Bentvena, Monastersky, and Struzzieri, who were charged with substantive offenses and conspiracy, the Court reversed on the

conspiracy charges for inadequacy of the evidence; a majority of the Court also agreed upon a reversal and new trial as to the substantive counts because of prejudicial joinder of the substantive counts with conspiracy count against the other defendants.

As heretofore stated, Appellant John Ormento filed a Motion to Vacate and Set Aside Judgment of Conviction pursuant to Title 28, § 2255, and also filed his Affidavit of Bias and Prejudice asking the Trial Court to recuse itself from entertaining said Section 2255 Petition, and appellant also filed thirty-nine Interrogatories pertaining to his Section 2255 Petition.

Appellant John Ormento was given forty years imprisonment following the verdict of guilty by a jury on the conspiracy Count of the indictment alleging violation of 21 U.S.C. Section 174. He appealed said judgment of conviction to the Second Circuit and said judgment was affirmed. Ormento then filed a Petition for Writ of Certiorari in the United States Supreme Court, and the same was denied. 370 U.S. 940 (Dec. 9, 1963).

A Section 2255 Petition to Vacate and Set Aside Ormento's conviction was approximately eighty-four (84) pages long, including exhibits, and for purpose of brevity embraced eighteen general specifications which are hereinafter set out.

A. The indictment charging conspiracy, under Count 8, as to John Ormento, was faulty and defective because of the constitutional infirmity in that:

B. The conspiracy statute, as applied herein to Ormento, was unconstitutionally applied because the trial court, in its charge, failed to mention the testimony of Rowan, the ex-agent, whose testimony not only contradicted, but actually negated the testimony of the Government's paid informer Smith.

C. The sentencing provisions of Title 21, U.S.C. Section 174, under which Ormento was sentenced, is

unconstitutional because it permits cruel and unusual punishment on its face, and as applied to Ormento.

D. The sentence of forty years imposed in this case is excessive and under the applicable law, should be vacated and a term not exceeding five years should be imposed.

E. The prejudicial conduct of the trial judge in this cause warrants the granting of this motion.

F. The introduction of illegally obtained evidence against Ormento and co-defendants was highly prejudicial and damaging to Ormento's defense because it tended to unduly bolster a very flimsy case against Ormento.

G. An analysis of cases involving some of the issues in this Petition recently tried and decided in the Second Circuit demonstrates that the Second Circuit has relaxed its heretofore harsher and stricter rules involving procedural rights and substantive rights. (See *United States ex rel. Davis v. McMann*, 386 F.2d 611, 3 C.L.B. 641. "Court of Appeals, 2d Cir.; *United States v. David Henry Mitchell III*, 354 F.2d 767, 2 C.L.B. No. 1, p. 40; *United States ex rel. Maselli v. Reincke*, 383 F.2d 129, 3 C.L.B. 490.")

H. THIS MOTION AND THE FILES AND RECORDS OF THIS CASE CONCLUSIVELY SHOW THAT THE PETITIONER/PRISONER, JOHN ORMENTO, IS ENTITLED TO RELIEF, AND IS ENTITLED TO OBTAIN COLLATERAL REVIEW OF THE PROPRIETY OF THE INSTRUCTIONS GIVEN IN THIS CAUSE. (See *United States v. Peoni*, 100 F.2d 401, 403 (C.C.A.2d, 1938); *Williams v. United States*, 131 F.2d 21; *Henzol v. United States*, ___ F.2d 664; *Edgerton v. United States*, 143 F.2d 698; *Dodge v. United States*, 2nd Cir. 258 F.2d 300; *United States v. Vasen*, 222 F.2d 3; *United States v. Levy*, 153 F.2d 995; *United States v. Gordon*, 242 F.2d 122; *United States v. Malfi*, 264 F.2d 147; *Screws v. United States*, 325 U.S.

91; *United States v. Messiah*, 307 F.2d 62, 71, C.A. 2nd Cir., 1962.)

I. PETITIONER, JOHN ORMENTO, WAS DENIED A FAIR CONSTITUTIONAL TRIAL THROUGH BEING FORCED AGAINST HIS WILL TO REMAIN ON TRIAL WITH A CO-DEFENDANT, SALVATORE PANICO, WHEN THE LATTER WAS ENGAGING, AND WOULD PREDICTABLY CONTINUE TO ENGAGE IN CONDUCT WHICH HE WAS HELPLESS TO AVOID IN A MEDICAL SENSE; AND WHICH PREJUDICIALLY DIMINISHED THE CHANCES OF ORMENTO FOR A FAIR JURY CONSIDERATION OF HIS CASE. (See *Panico v. United States*, 375 U.S. 29.)

J. THIS PARAGRAPH AND THE FILES AND RECORDS IN THIS CASE CONCLUSIVELY SHOW THAT ORMENTO IS ENTITLED TO RELIEF. In this paragraph of presentation of errors, which makes a conviction of Ormento constitutionally infirm, we ask the Court's indulgence and set out certain facts which we deem important, realizing of course that we have already extended the Court's patience by the length of this petition. We will divide this final paragraph into three classes, namely:

1. The professional responsibility of the District Attorney in prosecuting Federal criminal charges; and

2. The unconscionable excessive punishment meted out to Ormento; and

3. The plain error that glaringly existed in Ormento's trial.

K. ORMENTO'S 40-YEAR SENTENCE WAS NOT ONLY EXCESSIVE PUNISHMENT, BUT WAS INHUMANLY CRUEL. BECAUSE OF ALL THE DEFENDANTS INVOLVED, ORMENTO WAS THE FURTHEST REMOVED FROM ANY CREDIBLE EVIDENCE PROVING THE EXISTENCE OF A CONSPIRACY. We need not rehash the sordid, weird, and bizarre testimony of the Government

informant, Smith, but it will suffice to repeat what has been said about informers heretofore, and in addition thereto, we will cite the dissenting opinion of the then Chief Justice Warren in *Hoffa v. United States*, 385 U.S. 293:

"The finding in question here is not one which the District Judge arrived at by resolving contradictory testimony on the basis of credibility. Findings of fact based on crediting the testimony of some witnesses and discrediting the testimony of others may properly be accorded some insulation from appellate review because of the superior opportunity of the trial judge to observe the demeanor of the witnesses. In this case, however, the testimony concerning the circumstances surrounding Partin's entry into Hoffa's councils was not substantially in dispute. While those circumstances are set forth in greater detail infra, a brief summary discloses that Partin, after discussing Hoffa with federal agents and learning of their intense and mutually beneficial interest, successfully solicited an invitation to meet with Hoffa. Partin's release from jail was assisted by the federal agents, and he was compensated in a financial sense as well; in return, he kept the federal agents fully informed of all that occurred from the outset of his contact with Hoffa.

"Surely the only reasonable construction of these facts is that Partin was acting as a paid federal informer when he traveled to Nashville and attached himself to Hoffa. And the fact that Hoffa on Partin's urging agreed to a meeting in Nashville is not inconsistent with this conclusion. An invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invastion accomplished by force. See Messiah v. United States, 377 U.S. 201, 12 L. ed. 2d 256, 84 S. Ct. 1226 (1964); Gouled v. United States, 255 U.S. 298, 65 L. ed. 647, 41 S. Ct. 261 (1921).

* * * * *

"Here Edward Partin, a jailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments. And it is interesting to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air."

* * * * *

"This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

* * * * *

L. THE PLAIN ERROR THAT GLARINGLY EXISTED IN ORMENTO'S TRIAL. Ormento respectfully contends that the trial court failed at any point in its charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy, and thereby committed the plain and reversible error that the Second Circuit condemned in *United States v. Messiah*, 307 F.2d 63, 70 (2d Cir. 1962).

We do not deem it necessary to recite the entire charge to the jury, but we will set out the charge

discussing the first element of the crime of conspiracy, namely, the existence of the conspiracy as charged in the indictment.

"The first element is satisfied if, from proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding way so as to bring about an agreement to illegally import and distribute narcotics as charged.

"You may find that the conspiracy existed even if you find that one or more of the persons charged were not members. It is sufficient if any two or more persons have conspired. You may find those defendants guilty who joined the conspiracy with knowledge of its purpose and acquit those who did not join. [Emphasis supplied.]

"Such a conspiracy (single) may be shown to exist, you will recall, if two or more of the defendants or co-conspirators in some way or manner came to a mutual understanding to accomplish the broad objectives set out in the indictment. Whether or not each defendant joined in this conspiracy is another matter which I shall come to in a moment.

"If, after considering all the evidence, you decide that the government has failed to prove, beyond a reasonable doubt, the existence of one overall conspiracy to import and deal in narcotics illegally as charged, the second element which you must next decide, as to each defendant separately, is whether the government has proved beyond a reasonable doubt, that he knowingly and intentionally joined or became a member of the conspiracy with knowledge of its unlawful purpose.

* * * * *

"The mere fact, however, that a defendant may be present at meetings or associated with members of the conspiracy is not in itself enough to make him a conspirator unless you first find that he intentionally joined a conspiracy with knowledge of its purpose.

* * * * *

"Those who came in later, with knowledge of the aims and purposes of the conspiracy, and cooperate in a common effort to attain the unlawful results, become parties to the conspiracy. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One may become a member of the conspiracy without full knowledge of all of the details of the conspiracy. One defendant may know only one other member of the conspiracy, yet, if he knowingly cooperates to further the object of the conspiracy, with knowledge that others have combined to violate the law, he becomes a member although his role may be only a subordinate one." [Emphasis added.]

Ormento respectfully contends that these portions of the charge were erroneous and, as a result thereby, he did not receive a fair and impartial trial, and that there is plain error in these charges, and that, "These charges may have resulted in a miscarriage of justice or in the denial to appellant [Ormento] of a fair trial." See *Herzog v. United States*, 235 F.2d 664 (9th Cir. en banc), cert. den., 325 U.S. 844 (1956).

M. THE CONSPIRACY STATUTE UNDER WHICH ORMENTO WAS INDICTED, TRIED, AND FOUND GUILTY, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO ORMENTO, ALL AS HEREINAFTER SET OUT. The indictment, charged Ormento with violation of and a conspiracy to violate the federal narcotics law, 21 U.S.C. Sections 173 and 174. The first trial, before Judge Levet and a jury, ended in a declaration of a mistrial, after a trial of six months. The retrial of fourteen of the defendants began before Judge McMahon and a jury on April 2nd, 1962, on counts 4 and 5, charging sales of narcotic drugs and count 8, charging a conspiracy to import and distribute drugs.

Count four named Orlandino, Struzzieri and Monastersky; count five named Monastersky, Bentvena and Struzzieri. Orlandino pleaded guilty at the beginning of the first trial. All appellants were named in count eight.

The following sentences were imposed: Bentvena–15 years on counts 5 and 8; Di Pietro–20 years; Fernandez–35 years; Galante–20 years and $20,000; Loicano–20 years; Mancino–20 years; Mirra–20 years; Monastersky–30 years on counts 4, 5, and 8; Ormento–40 years and $20,000; Carmine Panico–12 years; Salvatore Panico–20 years; Sciremammano–12 years; Struzzieri–12 years on counts 4, 5, and 8. The sentences imposed on multiple counts are to run concurrently. Fernandez, Monastersky, and Ormento were sentenced as multiple offenders pursuant to 26 U.S.C. § 7237(c).

It is the contention of Ormento that the conspiracy statute under which he was indicted, tried, found guilty, and sentenced, is unconstitutional on its face and as applied.

It is an elementary principle of criminal law that a crime is composed of two elements, those being the *mens rea*, which means the criminal intent, coupled with the *actus reus*, which denotes the criminal overt act. From the earliest times; dating back to the 13th Century, in order for a crime to exist, there has been the necessity for both the *mens rea* and the *actus reus* to occur simultaneously, the only exception being the Doctrine of Continuing Intent.

From the very inception of the usage of conspiracy charges, great pains and precautions were undertaken, because of the implications that could conceivably exist and do actually exist because of the potential evil involved in the very nature of the crime.

The questioned statute is unconstitutional on its face, in that it contemplates a criminal intent, by the taking of an overt act, innocent in itself, and makes it a criminal act under the sweeping scope of the questioned statute. Furthermore, it abridges the First Amendment right of free speech; it violates the prescriptions of the Fifth Amendment, with reference to deprivation of life, liberty, and pursuit of happiness without due process of law.

The questioned statute is void and unconstitutional, and the indictments drawn thereunder are void and unconstitutional in violation of the First Amendment, in its abridgment of the right of free speech, and is in violation of the Fifth Amendment to the Constitution of the United States for the reason that the indictment arbitrarily and discriminately deprives Ormento of his freedom of locomotion on the streets of New York City, the overt act alleged, and the scope and over-breadth of the indictment permitted the return of the same against Ormento, because it permitted a perfectly legal act to be used as an overt act, and, thus, Ormento was discriminated against, and the indictment arbitrarily and discriminately deprived Ormento of substantive due process. Furthermore, the Grand Jury which returned the indictment had all the earmarks of a "special" Grand Jury, with reference to the meager paid limited participation by the paid Government informer Smith, who refused to appear before the "special" Grand Jury without payment or promise of payment.

The questioned statute, under which the indictment was drawn, namely, Count eight, the conspiracy count, was interpreted in such a way that the indictment in this case is found to charge an offense against the United States and, therefore, the statute is void and unconstitutional in violation of the Fifth

Amendment to the Constitution of the United States, because such construction with reference to Ormento does and did inject such vagueness and uncertainty, with reference to the overt act, in a penal statute, as to constitute a denial of due process of law and would be arbitrary and discriminatory as to Ormento, which the Congress of the United States has no constitutional power to enact, and would fail to inform its governed of criminal conduct prescribed, namely, Ormento and the co-defendants.

Furthermore, the indictment is void as to Count eight, relating to Ormento, and of no effect for the reason that Count eight, and the overt act, is so vague, indefinite, uncertain, and insufficient that it fails to sufficiently inform Ormento of the nature and cause of the accusation, in violation of the Sixth Amendment to the Constitution of the United States, and fails to afford Ormento the opportunity of so identifying the offense as to plead it in bar of future prosecution. Furthermore, Congress, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen (Ormento), with reasonable precision of the acts which it intends to prohibit, so that he may have a certain, understandable rule of conduct and know what act it is his duty to avoid. *Champlin Ref. Co. v. Corporation Com.*, 286 U.S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; *United States v. Brewer*, 139 U.S. 273, 35 L. ed. 190, 11 S. Ct. 538. See also *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 65 L. ed. 516, 41 S. Ct. 298, 14 A.L.R. 1045.

Notwithstanding anything said by the Second Circuit in the *United States v. Persisco*, 305 F.2d 534, 540, the questioned statute and the conspiracy charge drawn thereunder made possible and did result in the following:

(1) the conviction of appellant rests entirely on such uncorroborated accomplice evidence.

(2) the accomplice was in the pay of the prosecution at all times when accusing and testifying against the defendant, and had no other source of livelihood.

(3) the accomplice received special consideration from the Government in respect of his income tax liability, his alien status, and his admitted lying under oath.

(4) the accomplice admitted to a continuous course of lying, including lies before the Grand Jury and at the first trial of this case.

(5) the accomplice had said on the stand at the present trial, "If the fear is great enough, I'll lie."

(6) the accomplice told the Grand Jury that after the first time he met appellant he "never saw him after that."

(7) the accomplice's critical testimony concerning the present appellant reflects recent contrivance, inasmuch as it was not presented to the Grand Jury here nor given to any Federal agent until June or July 1960, although such agents had previously inquired regarding the present appellant.

(8) the accomplice's testimony was strengthened by trial judge's instruction to the jury to acquit "if you believe that the prosecutor did induce or use Cadieux's testimony."

It is understandable why the conspiracy statute is called the "darling of the Prosecutor," because of the breadth of its substantive scope, the conspiracy prosecution can be called the despair of the defense lawyers, because of the procedural perils it presents to individual defendants.

The protracted duration of the proceeding, the "confusing array of defendants," "the difficulties of compartmentalizing the independent evidence" as to the individual defendants, "the harassing problems arising from the participation of the great number of separate counsel representing individual defendants," including duplication of evidence, repetitive cross examination, many side-bar conferences and "disruption of the flow of evidence"—all of these problems make it difficult, this Court observed in the *Aqueci* case, for these trials to "steer a straight course toward the determination of innocence or guilt." (See *United States v. Aqueci*, Docket No. 27466, 2nd Cir., decided November 8, 1962.)

For some years now, the conspiracy prosecution has been the subject of considerable critical comment. Much of the discussion has turned on the character of the substantive concept of conspiracy and many courts and writers have decried the ease with which prosecutors can use the concept to thwart the true ends of justice. (See, e.g., *Krulewitch v. United States*, 336 U.S. 440, 453, per *Jackson J.*, concurring; *Kotteakos v. United States*, 328 U.S. 750, 776; *Harrison v. United States*, 7 F.2d 259, 263; *Sayre, "Criminal Conspiracy,"* 35 Harv. L. Rev. 393.) It was in this context that the late Judge Hand, writing for this Court, pinned a lasting label on conspiracy—"the darling of the modern prosecutor's nursery." (*Harrison v. United States*, 7 F.2d 259, 263, supra.)

Aside from its substantive aspect, however, thoughtful discussion of the conspiracy prosecution has also turned on the procedural pitfalls it represents. (See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 776, supra; *Krulewitch v. United States, supra; United States v. Agueci, supra;* Committee of the Judicial Conference of the United States,

"Report on Procedure in Anti-Trust and Other Protracted Cases," 13 F.R.D. 62; 1925 Atty. General Ann. Rep. 5-6; *O'Brien, "Loyalty Tests and Guilt by Association,"* 61 Harv. L. Rev. 592, 602; *Ryan, "A Judicial Solution to the Procedural Problems of the So-Called Big Cases,"* 41 Geo. L. J. 182; Note, *"The Conspiracy Dilemma," Prosecution of Group Crime or Protection of Individual Defendants,* 62 Harv. L. Rev. 276.) In general, all the courts and writers who have thought about the procedural problem posed by the conspiracy trial have concluded that it presents a grave threat to the individual right of each of the alleged conspirators to a fair trial. Conspiracy trials, the Supreme Court has said, are "proceedings . . . exceptional to our tradition and call for the use of every safeguard to individualize each defendant in relation to the mass." (*Kotteakos v. United States, supra.*)

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime. The precise charge was a conspiracy to import narcotics. The gist of the crime of conspiracy is an agreement between two or more people rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had some "unity of purpose, some common design for undertaking, some meeting of the minds in an unlawful arrangement . . ." *Shannabarger v. United States,* 99 F.2d 957, 961 (8th Cir. 1938).

The Government failed to prove a prima facie case against Ormento on a conspiracy count. This Circuit had this to say about conspiracy, ". . . the gist of the offense [of conspiracy] remains the

agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant." *United States v. Borelli*, 336 F.2d 376, 384 (2nd Cir. 1964).

Because of the length of the Affidavit of Bias and Prejudice, filed pursuant to Title 28 § 144, Petitioner will set out only what he considered the most material facts in the interests of brevity.

Judge McMahon, by his conduct and statements during the trial of this cause, entered into the following colloquy with counsel for defendant, Ormento, co-defendants, their counsel, and various court attaches:

(Jury present)

(At this point, as the Judge entered the courtroom and ascended the bench, the defendant, Salvatore Panico stepped into the jury box.

. . . walked along the inside of the rail, from one end of the box to the other, pushing the jurors in the front row.)

Defendant Salvatore Panico: (Screaming) "Get out of here. The Judge has got me guilty. Big John, Joe B, they are the junk pushers. We're innocent. My brother and I, we haven't got anything to do with this thing. They have me in jail already. Do you understand me? They have us in jail for nothing. They got us in jail. Twenty years they want to give me."

The Court: (To the deputy marshals) "Take him out of here."

Defendant Salvatore Panico: "Twenty years for nothing. Ruined for life. For what? Ruined for life, for what?"

The Court: (To the deputy marshals) "Take him out of here."

(The defendant Salvatore Panico [still screaming] was taken out of the courtroom by the deputy marshals.)

Defendant Carmine Panico: "I want to see my brother."

The Court: "Sit down."

The Clerk: "Be seated."

The Court: "Carmine Panico, you may go back in here (pointing to the cell block behind the courtroom) and see him when he calms down."

Defendant Panico: (To the Court) ". . . You think that he's all right. What you're doing, it is a shame, it ain't fair, to allow a frame. A lousy bum like that (pointing to the Court). A shame in your heart that you stand up there near the flag which I served for."

The Court: (To the deputy marshals) "Take him in back."

Defendant Panico: (Pointing to Court and Prosecutor) "It is a dirty shame what you are doing, to ruin families, you bastards."

(The Defendant Carmine Panico was taken out of the courtroom by the deputy marshals.)

(Pause)

The Court: "Ladies and gentlemen, I must tell you now that despite that, we are all under a duty here to see that every one of these defendants gets a fair trial, including Salvatore Panico and his brother, Carmine, and you must disregard it. As I have told you many times, this case must be decided on the evidence and on nothing else but the evidence, and Salvatore Panico's conduct or his brother's is not evidence, and you must not let it influence you in determining the guilt or innocence of any defendant, particularly the two Panicos."

Mr. Siegal: "If your Honor please, may we have the jury excused?"

The Court: "I want to be sure he is out of there first. That is all I am waiting for. Mr. Clerk, make sure the hallway is clear. If so, the jury may take a recess.". (Pause)

The Clerk: "All right, your Honor."

The Court: "All right, the jury make take a short recess."

(Jury left the courtroom)

The Court: "Does the record reflect that he climbed into the jury box?"

The Reporter: "Yes."

(The defendant Carmine Panico returned to the courtroom.) (Pause)

The Court: "Mr. Krieger, Mr. Rosenthal and Mr. Siegal, would you come up here with Carmine Panico and Mr. Tendy." (At the bench)

The Court: "I am going to have your brother brought downstairs, and I want you to go down there and see if you can calm him down so that this trial can proceed in an orderly way. I don't know what caused that outburst. It happened when the Court came on the bench, but it was—"

Defendant Carmine Panico: "The cause? It is the pressure. It is on everybody, Your Honor, what caused it."

The Court: "There is no pressure on everybody. We are moving this trial along."

Defendant Carmine Panico: "How much can you take, Your Honor? How much?"

The Court: "I just want you to go down and try to calm him down for his good and your good and everybody else's good. Now go down and try to do it, and you go down to the cellar with the marshal where your brother is, and I want the other defendants to be able to go out and have a cigarette and relax."

(Defendant Carmine Panico left the courtroom.)

* * * * *

Mr. Luney: "I was seated at counsel table. Your Honor had just returned to the court. We had just concluded a short recess.

At that point I heard an outburst from Mr. Panico, I don't know which one—Mr. Salvatore Panico, I am told by counsel. I turned right, I observed Mr. Panico within the jury box, which he entered at the side furthest from the bench, and proceeded from Juror No. 5, to Juror No. 1, in the front row."

The Court: "Laying hands on the jury."

Mr. Luney: "Laying hands on the jurors and to my observation threatening those jurors in the back two rows that he could not lay his hands on. I observed jurors numbered 6, 7 and 8 on the left-hand side of the second row, shrinking back from what he was saying and what he was doing.

"I observed a marshal or marshals forcible remove him from the jury box at the side of the jury box closest to the bench, Mr. Panico having traveled the length of the front row within the jury box.

"That is what I observed, Your Honor. The statements which I heard I will state for the record as I can recall.

"I heard Mr. Panico say something in reference to what are you doing here? I heard him mention the name of Mr. Ormento in connection with dope or narcotics. I heard him use the word 'frame.' Beyond that, I would have to defer on my part to what the record of the proceeding says. Based on what I saw—"

* * * * *

Mr. Consentino: "This Salvatore Panico has been sitting behind me for the last few days, and he has been mumbling all day long. I tried to stop him a few times and was unable to do so. I don't know what significance that has, but I want to bring it to your Honor's attention."

The Court: "Is there anyone else who wants to state his observations for the record?"

Mr. Tendy: "I think that the versions given by Mr. Luney and Mr. Krieger, at least insofar as my

observations are concerned; are substantially correct, with one correction. I first observed Mr. Panico inside the rail in front of Juror No. 3. I did not see anything or hear anything that would suggest that he was threatening the jurors. My impression was that he was saying to them in substance 'Go home, we don't need you. What do we need you here for?' He was waving his arms and his hands did come in contact with the jurors, but not in the sense that he was attempting, as might be implied or inferred from what Mr. Luney said, any violence."

The Court: "Mr. Rosner?"

Mr. Rosner: "I have nothing to say, nothing to add."

* * * * *

Mr. Consentino: "May I also add that I heard what Mr. Panico said. He said 'Joe B and John Ormento, they are the dope pushers.'"

The Court: "I heard no such thing."

Mr. Consentino: "Well, I did, your Honor. I think that the minutes would reflect that."

Mr. Rosenthal: "I might say for the record that I heard the name of Joe B and Ormento used in connection with the words 'dope pushers,' but the context of it I would not be able to say."

* * * * *

Mr. Siegel: "The co-defendant Panico specifically mentioned the name of John Ormento as the narcotics pusher, and I don't see how it is possible for your Honor, no matter how hard you try—I know you would want to try to erase from the minds of those jurors who must have heard that, because they were right on top of the man, we heard all the way over here—that a co-defendant said John Ormento was a dope pusher. I submit, if your Honor please, that the prejudice is irretrievable, that there is no possibility in the world of proceeding with this trial and giving Ormento a fair determination at the hands of these jurors.

> "I must respectfully urge your Honor to seriously consider this motion to withdraw a juror and to declare a mistrial."

* * * * *

The record in this cause clearly shows improper consideration prior to the trial, during the trial and in sentencing Ormento.

It is clear that the trial court had the first aborted trial in mind or during the immediate trial because of the following quote:

> "The Court takes judicial notice of the trial record of the trial before Judge Levet and the fact that it was aborted. The Court is also aware of the number of delays and discrepancies of this trial caused by the defendants and some of their counsel. For these reasons and a number of others which I haven't the time at this point to enumerate, I decline this appeal."

Also prejudice by the atmosphere prior to the trial and during the trial and especially by the actions of Ormento's co-defendant, Salvatore Panico, which the court characterized as a put-up job, the record consistently shows the prejudice against Ormento by the actions and conduct of his co-defendants. There was no misconduct of Ormento before the jury; there was an out-of-court remark directed to the District Attorney, because of the failure to provide a dentist and the court itself said that this was the only thing against Ormento.

It must be clear that aborted arrests and improper charges, coupled with the facts which occasioned in the previous trial, were in the Court's eye, given improper consideration, and which resulted in the improper sentence of 40 years, the longest of any sentence meted out. Ormento was also fined $20,000. It is equally clear that the above facts should have no place in determining the sentence. *United States v. Myer*, 3 Cir., 374 F.2d 707, 708. See also *Butler v. District of Columbia*, C.A. D.C. 346 F.2d 798, 799.

This extensive sentence was based on improper consideration and should not be allowed to stand.

The issue of the Judge as a "material witness" in our case cannot be avoided by any such general rationale because again, several times in the trial, Judge McMahon announced his own observations and conclusions that Salvatore Panico was not suffering from any medically significant mental disorder but was faking. This is the very issue which must now be readjudicated by an evidentiary hearing in this 2255 hearing. How can Judge McMahon's 1962 observations be given any probative weight without the Judge having to take the witness stand in a 2255 hearing?

Furthermore, a Judge who is going to be a material witness in a 2255 proceeding, especially in the peculiarly personalized factual circumstances here presented, should not sit in that proceeding for any purpose, including the decision of preliminary questions of law such as the question of whether a case is made out for an evidentiary hearing. This would appear to be the meaning of the words of 28 U.S.C. § 455 that a Judge who is a material witness ought not "to sit on a trial, appeal or other proceeding therein." While there appears to have been two reported decisions to the effect that the statute (28 U.S.C. § 455) does not prevent a disqualified Judge from sitting with respect to preliminary orders, those decisions were rendered at a time when the statute provided only that a Judge challenged thereunder might not "sit on the trial," i.e., this was prior to the addition of the statutory language "or other proceedings therein"; furthermore, the two decisions to which we refer (cited infra) dealt with preliminary matters of a merely formal kind, in no way resembling the critical and dispositive kind of question involved in a determination of whether a 2255 motion presents a case for an evidentiary hearing. The two cases referred to are *In re Fox West Coast Theatres*, 25 F. Supp. 250, 258 (S.D. Cal. 1936), affirmed 88 F.2d 212, *cert. den.* 301 U.S. 710, *reh. den.*

304 U.S. 772; *Hasbrouck Heights v. Agrios*, 10 F. Supp. 371, 374 (D. N.J. 1935). It is noteworthy also that where the disqualification asserted under 28 U.S.C. § 455 refers to a case in which the Judge "has a substantial interest, has been of counsel, (or) is or has been a material witness" as distinct from merely a case where the Judge is alleged to be "so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to "sit," the Judge's measure of discretionary choice as to whether or not to disqualify himself is not left merely to the Judge's own personal opinion or merely to his own "conscience and judgment," but in such former cases it would appear to be the Judge's duty to disqualify himself. *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 987-990 (M.D. Ala. 1912).

ORMENTO HAS THE RIGHT TO ASK FOR A CHANGE OF JUDGE FOR THE FURTHER FOLLOWING REASONS:

In Ormento's appeal, his counsel's strategy is not binding on Ormento because of the facts set out in his Section 2255 petition, which conclusively show that an officer and officers of the United States blocked him from conferring with and assisting his attorney in the nature of the preparation and prosecution of direct appeal in his case.

Petitioner is not foreclosed from federal collateral relief, as he did not bypass normal appeal procedure, deliberately or through inexcusable neglect. 28 U.S.A.C. Sec. 2255.

In application for a new judge, or in the case at bar, if the affiant therein states a judge should disqualify himself in post conviction relief procedure, not only as a material witness, 28 U.S.C.A. Sec. 453, 2255, but in determining the personal bias and prejudice, the judge must know all the facts and allegations in support of such a charge; his duty to allow it or affirm or allege is no less imperative than to deny it. 28 C.A. Sec. 144.

That the Honorable Judge of this Court is biased and prejudiced against John Ormento is a fact demonstrable from what occurred during Ormento's trial in this Court. During the trial the Honorable Judge of this Court specifically and flatly stated that he was remanding Ormento to custody purely because of what he had heard regarding another trial and not on the basis of anything which had taken place during the trial at which the said remand ruling occurred:

> ***The Court:*** "I had hoped not to have to do it, but the trickery that I saw before my very eyes this afternoon has persuaded me that the only way to conduct this trial is to remand these defendants. I am not going to put up with that sort of nonsense. I think I made that pretty clear from the outset. These defendants were living under the shadow of it in view of what transpired at the last trial, and I saw it happen before my very eyes this afternoon on this switch between Di Pietro and Struzziere, smart Alec tactics and misstatement of record. Although the witness did testify that Struzziere had a black tie, he definitely identified Struzziere who stood up at the same time, following Bentvena. I am not going to put up with that. I remand the defendants."
>
> ***Mr. Siegal:*** "If your Honor please, I hold in my hand a newspaper, The Daily News, Wednesday, April 4, 1962, and I submit to your Honor most respectfully that the article here is most inflammatory and prejudicial against my client, Mr. John Ormento, and I would like to read into the record—it is very short—as follows:
>
> "'Ormento Retrial Jury Selected—a 10-man 2-woman jury Federal Court jury selected yesterday for the retrial of John (Big John) Ormento and 13 others on narcotics conspiracy charges was cautioned by Judge Lloyd F. McMahon that if anyone attempts to talk to you about the case, run away from them. The first trial ended in a mistrial last May 14 when injuries prohibited the jury foreman from continuing.'

> "I must respectfully submit that this defendant, Ormento, has been deprived of a fair trial, cannot possibly get a fair trial in view of those statements and the insinuations and the threats, the possible threats, that the jury can read into it as far as they are concerned. I think it is intimidation of the jury in the worst form."

Mr. Siegal then asked the jury to be admonished to avoid the article but that any voir dire as to whether they had read it be conducted the following day because the edition of the newspaper was so recent that the jurors had no opportunity whatsoever to see it. The Court took the unreasonable course of conducting the voir dire immediately, bringing no response from the jurors. Mr. Siegal stated no vigorous opposition to the Court's course of action. Then, later in the same afternoon, Mr. Siegal made a very minor inquiry of the Court:

> ***Mr. Siegal:*** "May I inquire if we have that continuing objection to this line of questioning?"
>
> ***The Court:*** "Yes, subject to connection. I thought I had made that clear yesterday, Mr. Siegal."
>
> ***Mr. Siegal:*** "Thank you." (Tr. p. 458)

The foregoing constitutes the entire participation of Ormento and his counsel in the trial up to the time that Ormento was remanded with the other defendants into custody. There was no possible basis for remanding Ormento which could be found in the proceedings which led up to his remand and the judge of this Court stated specifically that he was basing the remand purely on matters of reputation which he had heard regarding another trial at which he did not preside. This conduct coincides precisely with the proper definition of bias and prejudice and the foregoing showing is a showing of bias and prejudice per se.

The trial jurors were unduly influenced, as a result thereby, they were biased and prejudiced against Ormento and the co-defendants by reason of the familiarity and fraternizing that existed between the United States Marshal

assigned to said case, with particular reference to Juror Number Ten and other jurors trying said cause, with particular reference to said jurors being escorted to and from the courtroom and to their homes during the progress of said trial; furthermore, numerous other United States agents and employees exhibited the same familiarity and treatment toward said juror, which due to the inordinate length of the trial, namely five and one-half months, was bound to, and did have a prejudicial effect upon Ormento and the co-defendants.

One of the considerations that apparently prompted the remand of Ormento and the co-defendants happened on or about June 5, immediately after a conference was called by Judge McMahon either in his chambers or in the robing room, wherein he called in the 13 defendants and their counsel and there was a colloquy between the court and the District Attorney which in substance, and in general was to the effect that the District Attorney claimed that one of the Government's witnesses, a woman, had been killed, and the imputation and context of the District Attorney's remarks were to the effect that her death was caused by the contrivance of the defendants: "It is a funny thing. He had a meeting with this expectant woman witness on a Thursday and had another appointment with her on a Monday. Sunday evening she was killed in her hallway where she lived. She was shot to death." He said, "I am not trying to say that the defendants had anything to do with it, but you know it is a funny situation." Thereupon the defendants, by themselves, and through their counsel, stated in substance that they knew nothing about it, because they didn't know the Government had such a witness and disclaimed any responsibility whatsoever with the episode. Immediately thereupon, after the colloquy between counsel of the defendants and the District Attorney and the Judge, the Judge then announced that he was going to remand all the defendants immediately.

The defendants thereupon made immediately appropriate arrangements for the investigation of the death of this

woman and the investigation within two weeks disclosed that the woman, who the District Attorney said was shot in the hallway of her residence, had for about four weeks previously, shot and injured her husband and was arrested for this and was out on bail bond. Thus, it affirmatively appears that there was a far greater probability that the woman's death should be attributable to her husband rather than through any connivance or contrivance through the defendants, because they didn't even know of her existence.

The bias and prejudice of the judge was accentuated by the continuous presence of two judo experts who were posted at the bench all during the trial. This could not fail to convey to the jury that the Court feared for his own safety, despite the presence of armed marshals behind each defendant during the trial. The presence of these two judo guards was unnecessary because of the extreme precautionary measures adopted by the Court, as hereinafter set out.

Ormento's defense was emasculated by the failure of his then counsel to secure a copy of a warrant in the hands of the authorities and available, which would show that at the time of an incident testified to by Smith wherein Smith testified that Ormento had a conversation with Smith and struck a co-defendant, which could have been practically disproved, however, or at least evidence would have been introduced to refute and rebut that particular testimony, because at the time Ormento was supposed to have been a fugitive, the existence of the warrant and the introduction of a copy of the same into evidence would have shown the improbability of Ormento being present at the time and place in question.

Ormento was further greatly prejudiced by his having been taken to Leavenworth in that he would have advised, and indeed demanded, that his then counsel would get the names and addresses of the grand jurors, the minutes and records and reports of the grand jury for the purpose of ascertaining whether or not a valid indictment had been

returned, and other information concerning the indictment and the importance of the same, the testimony and concessions by the Government with reference to the perjury of Smith before the grand jury and of Smith in testifying to two episodes concerning Ormento before the grand jury, including the quorum of the grand jury.

Ormento was further greatly prejudiced by the plethora of T.V. announcements and comments of and concerning the trial. This T.V. publicity began prior to the trial. This program called the Ten Commandments began at the same time of the beginning of the trial and continued for approximately half of the trial, the first half of the trial, namely, about two and one-half months, whereupon, upon the request of the District Attorney, the sponsors of the program caused the same to be stopped. During this movie presentation, the name of "Big John" Ormento would be televised and this pronouncement would continue several times during the program. The particular channel that telecast this would continue 24 hours every two weeks or every other week, and this, coupled with newspaper advertising, saturated and permeated the minds of the jury trying the cause.

In addition to the local ground rules promulgated by Judge McMahon wherein he forbade every defendant from leaving his seat, the Judge ordered an armed marshal to stand behind every defendant during the trial. The area surrounding the courtroom was cordoned and roped off and guards were placed around the courtroom. The trial took on the aspect of an armed military camp like the Nuremburg trials.

Ormento, along with the other defendants, was greatly prejudiced by the conduct, mannerisms, demeanor and deportment of the trial judge, in that the judge would turn his back while defense witnesses were testifying, thus indicating not only his disbelief in their testimony, but also extenuating his hostility, bias, and prejudice toward Ormento and the other defendants. This conduct was more frequent

when testimony was elicited from any defense witness which was favorable to the defendants, including Ormento. Ormento and the other defendants were greatly prejudiced by the trial court's charge to the jury with reference to the witness, Madame Cadieux, the Canadian witness whom the Court characterized as a keeper of a house of ill fame, which coupled with the trial court's refusal to comment to the jury in his charge about the testimony of Rowan, a United States Government agent, who was a witness for the defense. The Cadieux episode was magnified by the fact that in the first trial Cadieux was a witness for the Government, and in the second trial her deposition was taken in Canada, wherein she recanted all of her previous testimony given on behalf of the Government in the first trial.

The Court emphasized the great reliance he placed in the testimony of Edward Lawton Smith, a self-confessed accomplice, whose erroneous testimony was the sole evidence the Government relied upon to send Ormento to jail, for all practical purposes for his natural life. Smith, a self-confessed accomplice, had been importing narcotics from Canada, knowing such actions were in violation of the law (2384-85).

Smith is a Canadian (2150-51) who spent six years in Canadian jails (1440-41, 2173, 3166), and who had used so many aliases (2774-76, 3184) that he could not remember them all. (1959)

In April or May 1959, Smith became a "special employee" of the Federal Bureau of Narcotics (1664, 2454), i.e., a paid informer. His basic compensation was $12 per day or $360 or $372 a month (2183, 2456, 8724). In addition, he received $5,000 from the United States Government by way more for witness fees and expenses (2504, 8724), and $5,000 of reward for his services in this case (2844-45) $2,5000 more for witness fees and expenses (2504, 8724), and $5,000 additional from the Canadian Government after testifying on its behalf at a rogatory commission (2487, 2493-95, 2498, 2500).

Smith paid no United States income tax on any of these payments (2852), which represented Smith's only source of livelihood as he had no other occupation (2964). This has been his only occupation since coming to the United States (2962-65). Smith was still on the Bureau of Narcotics payroll while testifying at the present trial (2457).

At the first trial herein, Smith testified as follows: (2185-87)

Q. "Mr. Smith, you are not testifying here because you are a public spirited citizen, are you?

A. "Not exactly, no.

Q. "In fact, one of your prime considerations is the fact that you are getting $350 a month from the government, isn't that right?

A. "One of them, yes."

* * * * *

Q. "In addition to the moneys that you have received that you told his Honor and the jury about, have you been promised any money for testifying in this trial?"

* * * * *

A. "Well I understand that I would receive a reward, yes, sir."

Smith admitted that he had been expelled from school for lying (3165) and that he had lied on a Montreal license application (2842-43), and that he had lied before the grand jury (2169-70). In the course of a colloquy, the prosecutor admitted that Smith had lied before the grand jury (2543).

Smith testified (2836) that he would deliberately lie under oath and later said (3149-50):

* * * * *

Q. "Mr. Smith, do you always tell the truth when you are under oath to tell the truth?

* * * * *

A. "How do you want me to answer that?"

Q. "Yes or no."

A. "I can't answer it that way. It depends how scared I am. If the fear is great enough I'll lie."

In his charge, the trial judge pointed out the sums of money received by Smith (8724) (J.A. 133a), stated the rule that a conviction can be had on the uncorroborated testimony of an accomplice if believed (8725) (J.A. 134a), pointed out that Smith was the only witness against the appellant Ormento (8807) (J.A. 188a), and summed up the testimony for and against Ormento (8807) (J.A. 40-41) (J.A. 188a-190a). Exception was taken to the failure to mention Rowan in this connection (8844) (J.A. 321a). The judge had earlier said that Rowan had been fired from the Bureau because of lying (8726) (J.A. 134a-135a), failing to say that Rowan had only misstated the circumstances of an automobile accident, and that the Bureau thereafter gave him a letter of reference (7805-06).

THE TRIAL COURT UNDULY PREJUDICED THE JURY IN FAVOR OF THE GOVERNMENT BY ITS OVERWHELMING FAVORITISM TO THE PROSECUTION IN FULING UPON OBJECTIONS AND BY ITS HOSTILE ATTITUDE TOWARDS THE DEFENSE HEREIN.

The record discloses the sharp treatment of defense counsel for John Ormento, as well as sharp treatment of defense counsel for the co-defendants, and it will serve no useful purpose to elaborate and repeat the same here.

Furthermore, a quantitative analysis of the trial court's rulings compels the conclusion that the Court was hostile to the defense, and such hostility was obvious to the jury. The record shows that one juror was excused during the voir dire which obviously was visible to the other jurors.

The trial court, prior to and during the entire trial did not observe the mandate of judiciousness referred to in *United States v. Brandt*, 196 F.2d 653, 656, which is a second Circuit decision, decided in 1952.

Petitioner Ormento respectfully submits that the trial court, by its obvious antagonism to the defense, including

Ormento and the co-defendants, and its equally obvious favoritism to the prosecution deprived him of a fair trial.

Appellant filed 39 interrogatories which he deems pertinant, relevant and germane to the issues herein, taking cognizance of Harris v. Harris, Judge v. Nelson Warden 394 U.S. 286 as well as Kaufman v. United States 394 U.S. 217.

The interrogatories are set out in Appendix A.

REASONS FOR GRANTING THE WRIT

I. PETITIONER IS ENTITLED TO A HEARING UNDER 28 USC § 2255 ON HIS ALLEGATIONS OF THE TRIAL COURT'S BIAS AND PREJUDICE TOWARD PETITIONER, PETITIONER'S CO-DEFENDANTS, AND THE VERY NATURE OF THE CASE ITSELF.

Section 2255 empowers the court imposing a sentence in a criminal case to vacate it on the ground that it violates the Federal Constitution or laws, or exceeds the jurisdiction of the Court, or is otherwise subject to collateral attack.

The object and purpose of the statute is to afford a prisoner the right to make a direct attack on the legality of his detention, on any of the grounds for collateral attack enumerated in the third paragraph of the statute that arise at or prior to the time of the imposition of the sentence. It is intended to provide a prisoner in custody under sentence of a court established by an act of Congress an exclusive remedy for determining the legality of his detention in the court which imposed the sentence, where the matter can most readily and conventiently be heard, and to make final determination with respect to the legality of such detention conclusive, except in cases where the remedy thus provided is inadequate or ineffective to test the legality of such detention. *Barrett v. Hunter* (CA 10th Kan 1950) 180 F.2d 510.

The third paragraph of § 2255 provides that,

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled

> to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Under the terms of this provision there is no occasion for a hearing where the prisoner's motion and the records and files conclusively show that he is not entitled to relief. *Goodwin v. United States* (CA 8th Ark 1951) 191 F.2d 932.

Contrawise, where the motion and the files and records of the case do not conclusively show that the prisoner is entitled to no relief, he is entitled to a hearing. *United States v. Hayman* 342 US 205, 72 SCt. 263, 96 L ed 232 (1952); *James v. United States* (CA 5th Fla 1949) 175 F.2d 769; *Cherrie v. United States* (CA 10th Wyo, 1949) 179 F.2d 94; *Siebart v. United States* (CA 5th Tex 1950) 185 F.2d 124; *Howard v. United States* (CA 6th Ohio 1951) 186 F.2d 778; *Taylor v. United States* (CA 10th Okla 1952) 193 F.2d 411; *Juelich v. United States* (CA 5 1962) 300 F.2d 381.

It is clear from the above cited authorities that if the petition itself, or the records and files, show that the petitioner is not entitled to relief, the court may deny the motion, or refuse the grant a hearing, but in the event a prima facie case of illegal restraint, as is present in the case at bar, the court may either grant the relief or require a showing of cause why it should not be granted.

It is no longer open to question the availability of a collateral remedy to correct the violation of a constitutional right. *Walker v. Johnston* established the availability of habeas corpus for a federal prisoner who contended that his plea of guilty was the product of coercion and deception. *Smith v. O. Grady* did the same for persons held under the authority of state law. These cases stand in the long line of development of the statutory remedy of habeas corpus. At common law, the Great Writ did not inquire into the validity of the detention of a person who was held pursuant to a judgment of conviction of a crime entered by a competent tribunal. See *Ex parte Siebold*, 100 U.S. 371, 375 (1879). But the statutory remedy, now found in 28 U.S.C. § 2241

through § 2254, provides relief to any person "in custody in violation of the Constitution or laws or treaties of the United States." § 2241(C)(3).

In the nineteenth century, this Court sanctioned use of the writ to inquire into the constitutionality of an act of Congress which created the crime for which the petitioner was imprisoned. *Ex parte Siebold, supra.* There were also the double-jeopardy cases, *Ex parte Lange,* 18 Wall. 163, 85 U.S. 163 (1873); *In re Snow,* 120 U.S. 274 (1887); *Hans Nielsen, Petitioner,* 131 U.S. 176 (1889). In the early part of this century, the primary developments in the scope of the writ concerned state prisoners. Mr. Justice Holmes wrote for the Court in *Moore v. Dempsey,* 261 U.S. 86 (1923), where allegation of mob domination of the state trial court support issuance of the writ. The Court took another important step in *Mooney v. Holohan,* 294 U.S. 103 (1035), where it was held that a claim of knowing use by the state prosecutor of perjured testimony could be examined on habeas corpus.

It is clear, therefore, that petitioner's claim in this case falls well within the scope of the habeas corpus remedy as it had evolved prior to the adoption of § 2255 in the 1948 revision of the Judicial Code. The Court's decision in *United States v. Hayman,* 342 U.S. 205 (1952), established that the scope of the remedy under § 2255 is at least as broad as is the remedy under the writ of habeas corpus. Accordingly, it is clear that petitioner's claim is a proper one under § 2255. (See *Kaufman v. United States,* 395 U.S. 217, *Harris v. Nelson,* 394 U.S. 286.

INASMUCH AS THE DISTRICT COURT DENIED PETITIONER'S MOTION WITHOUT A HEARING, THE ALLEGATIONS IN HIS MOTION MUST BE ACCEPTED AS TRUE.

Section 2255 plainly requires a hearing in the present case. It provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of

fact and conclusions of law with respect thereto." This continues the rule applicable to petitions for habeas corpus. See *Walker v. Johnston*, 312 U.S. 275 (1941); *United States v. Hayman*, 342 U.S. 205, 213 (1952).

Certainly the motion in the present case does not conclusively show that the prisoner is entitled to no relief. To the contrary, as has been shown above, the motion presents a serious question of violation of the Constitution. If, after a hearing, petitioner's contentions are found to be true, his conviction must be set aside.

There is nothing in the files and records of the case which conclusively shows that petitioner is entitled to no relief.

We are constrained to encorporate a paragraph of *Machibroda v. United States*, 368 U.S. 487, for the sole and only purpose of showing that, since the matters alleged in Ormento's § 2255 petition were not fully litigated that a hearing should have been gratèd in his case.

We think the District Court did not proceed in conformity with the provisions of 28 USC § 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing. *United States v. Hayman*, 342 U.S. 205, 220, 96 L ed 232, 242, 72 S Ct 263. The statute requires a District Court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.

Smith paid no United States income tax on any of these payments (2852), which represented Smith's only source of livelihood as he had no other occupation (2964): This has been his only occupation since coming to the United States (2962-65). Smith was still on the Bureau of Narcotics payroll while testifying at the present trial (2457).

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The record discloses the sharp treatment of defense counsel for John Ormento, as well as sharp treatment of defense counsel for the co-defendants, and it will serve no useful purpose to elaborate and repeat the same here.

Furthermore, a quantitative analysis of the trial court's rulings compels the conclusion that the Court was hostile to the defense, and such hostility was obvious to the jury. The record shows that one juror was excused during the voir dire which obviously was visible to the other jurors.

The trial court, prior to and during the entire trial did not observe the mandate of judiciousness referred to in *United States v. Brandt*, 196 F.2d 653, 656, which is a second Circuit decision, decided in 1952.

Petitioner Ormento respectfully submits that the trial court, by its obvious antagonism to the defense, including

Smith paid no United States income tax on any of these payments (2852), which represented Smith's only source of livelihood as he had no other occupation (2964). This has been his only occupation since coming to the United States (2962-65). Smith was still on the Bureau of Narcotics payroll while testifying at the present trial (2457).

At the first trial herein, Smith testified as follows: (2185-87)

Q. "Mr. Smith, you are not testifying here because you are a public spirited citizen, are you?

A. "Not exactly, no.

Q. "In fact, one of your prime considerations is the fact that you are getting $350 a month from the government, isn't that right?

A. "One of them, yes."

* * * * *

Q. "In addition to the moneys that you have received that you told his Honor and the jury about, have you been promised any money for testifying in this trial?"

* * * * *

A. "Well I understand that I would receive a reward, yes, sir."

Smith admitted that he had been expelled from school for lying (3165) and that he had lied on a Montreal license application (2842-43), and that he had lied before the grand jury (2169-70). In the course of a colloquy, the prosecutor admitted that Smith had lied before the grand jury (2543).

Smith testified (2836) that he would deliberately lie under oath and later said (3149-50):

* * * * *

Q. "Mr. Smith, do you always tell the truth when you are under oath to tell the truth?

* * * * *

A. "How do you want me to answer that?"

Q. "Yes or no."

A. "I can't answer it that way. It depends how scared I am. If the fear is great enough I'll lie."

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We wonder—has the Due Process Clause of the Fifth Amendment of the Constitution of the United States become meaningless and been rendered impotent by reason of the repeated refusal of this Court to grant certiorari in cases involving conviction under federal jurisdiction where the issue of "Dur Process" was urged and is the only purposeful "Due Process" Clause remaining, that contained within the Fourteenth Amendment to the Constitution of the United States?

> (a) Must a person, convicted of violation of Federal Criminal Statutes by surmise, conjecture, suspicion, and guess, abandon all hope of having his conviction and the matters of law inherent thereto passed upon by the Supreme Court of the United States or may he hope to successfully petition for relief with equality with those convicted of minor offenses under the provisions of City Ordinances or State Laws? (See *Garner v. Louisiana*, U.S., 7 L.ed. 2d 207 [12/11/61]; *Thompson v. Louisville*, 362 U.S. 199, 4 L.ed. 2d 654.)

We say this because Ormonto did file his PETITION FOR WRIT OF MANDATE TO THE HONORABLE LLOYD MACMAHON, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW NEW YORK.

II. PETITIONER, ORMENTO, TIMELY AND PROPERLY FILED HIS AFFIDAVIT OF BIAS AND PREJUDICE PURSUANT TO 28 U.S.C. SECTION 144.

Appellant's Affidavit of Bias and Prejudice, filed pursuant to Title 28 Section 144, was sufficient in law and should have been granted. The Trial Court should have accepted as true every allegation of fact made as a predicate for Ormento's belief.

ORMENTO'S AFFIDAVIT SHOWED THE OBJECTIONABLE INCLINATION AND/OR DISPOSITION OF THE TRIAL JUDGE AND IT GAVE SUBSTANTIAL SUPPORT TO THE CHARGE OF

A BENT AND/OR PREJUDICED MIND THAT MAY PREVENT OR IMPEDE IMPARTIALITY OF JUDGMENT.

The Affidavit of Bias and Prejudice of Ormento consumed some 37 pages and it was reversible error for the Trial Court in refusing the recuse himself and/or disqualify himself from any further participation in this cause in its entirety after appellant timely and properly filed his Affidavit of Bias and Prejudice pursuant to 28 U.S.C. Section 144 144.

In *Morrison v. United States*, 32 F. Supp. 286 (1969), the Court had this to say about 28 U.S.C. 144:

> The Judge against whom an Affidavit of Bias and Prejudice is filed must pass upon the sufficiency of the affidavit, but not upon the truth or falsity of of the facts alleged. He must accept as true every allegation of fact made as a predicate for affiant's belief.
>
> When the affidavit of petitioner is so tested, it is insufficient for each of the following reasons:
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> (1) allegations are conclusory in nature rather than factual. There are no allegations of adequate facts to support such conclusions.
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> (2) Judge's bent of mind complained of is not shown to be a personal bias, estrajudicial in origin (it must arise outside the courtroom from sources unconnected with the case.)
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> (3) no other valid reason: Judge has a duty to sit when insufficient reason is presented for his recuse.

In the case at bar, the Affidavit of Bias and Prejudice of Ormento meets these requirements in the strictest construction of the statute.

The following is a resume of the case of *LaBuy v. Howes Leather*, 352 U.S. 249 (1957).

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In the case of *LaBuy*, the Supreme Court of the United States held that the United States Court of Appeals for the Seventh Circuit had discretionary power to issue the Writ

of Mandamus in aid of jurisdiction, and that in the *LaBuy* case, exercise of this power was proper since the District Court (Honorable Walter J. LaBuy) had abused his authority with respect thereto . . . A brief synopsis of this case is as follows:

> Exercising his power under Rule 53(b) of the Federal Rules of Civil Procedure, to refer cases for trial before a master, a judge of the United States District Court for the Northern District of Illinois, acting sua sponte, ordered references of certain antitrust cases for trial before a master. All of the parties objected to the references, filed motions to vacate them, and, upon the district judge's denial of these motions, brought mandamus actions in the United States Court of Appeals for the Seventh Circuit. The Court of Appeals (226 F. Supp. 703) ruled that it had the power to issue a writ of mandamus to compel the district judge to vacate his orders, and that the circumstances surrounding the references by the district judge made exercise of this power appropriate.
>
> On certiorari, the United States Supreme Court affirmed the ruling of the court below.

The relevancy of that case to the case at bar is obvious. Although this Honorable Court is far more familiar with Title 28 Section 144 than counsel could ever hope to be, nonetheless, Section 144 is set out herein verbatim:

> 144. "BIAS OR PREJUDICE OF JUDGE.—Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to

be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (June 25, 1948, c. 646, § 1, 62 Stat. 898; May 24, 1949, c. 139, § 65, Stat. 99.)"

An analysis of relevant cases is set out hereinafter to show that Ormento complied with all the requirements of Section 144, all as shown by his lengthy Affidavit of Bias and Prejudice containing some 37 pages, also counsel's Certificate of Good Faith attached thereto.

Suggestion that sentencing judge should have disqualified himself upon the hearing of defendant's motion to vacate and correct sentence and that the hearing should have been before some other judge was without merit where there was no charge of prejudice and no dispute in regard to any material fact. (1945) *Oxman v. United States* (CCA 8), 148 F. 2d 750, 159 ALR 155.

Only questions of law are presented by a judge's refusal to disqualify himself. (1958). *Green v. Murphy*, (CA 3), 259 F.2d 591.

Before a petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory. The consideration by a district judge of the sufficiency of an affidavit of bias and prejudice is not a ministerial, but a judicial act. (1960). *Albert v. United States District Court for the Western District of Michigan*, (CA 6), 283 F.2d 61.

Judge accused of bias could pass on legal sufficiency of affidavit, but not upon truth of its statements, and if affidavit was found sufficient he could proceed no further in the case. (1921) *Burger v. United States*, 255 U.S. 22, 65 L.Ed. 481, 41 SCR 230. (1926) *Lewis v. United States* (CCA 8), 14 F.2d, 369; (1937) *Simmons v. United States* (CCA 5) 89

F.2d 591; (1934) *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.* (DC-NY) 6 F. Supp. 215; (1937) *United States v. Buck* (DC-Mo) 18 F. Supp. 827; (1938) *United States v. Parker* (DC-NJ) 23 F. Supp. 880; (1943) *United States v. Costea* (DC-Mich) 52 F. Supp. 3; (1948) *Allen v. Dupont* (DC-Del) 75 F. Supp. 546.

Judge could pass upon the sufficiency of the affidavit but not upon its truth or falsity. (1929) *Cuddy v. Otis* (CCA 8) 33 F.2d 577; (1932) *Morse v. Lewis* (CCA 4) 54 F.2d 1027.

Affidavit could be made on information and belief. (1921) *Berger v. United States*, 255 U.S. 22, 65 L. Ed. 481, 41 SCR 230.

Petitioner asserts that *In Re Murchison* 349 U.S. 133, the Trial Court should have held a hearing on petitioner's motions. *Murchison* held that "no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome."

Comparison may not supply an exact measure of the action or remarks which cause the belief in the personal bias and prejudice of a respondent in cases like this. However, the character of the opprobrium and passion with which it was expressed can be judged by comparing the statements of the respondent judges in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *Connelly v. United States District Court*, 191 F.2d 692 (9th Cir. 1951), and the case at bar.

BERGER

Reeking with disloyalty; Pacifists against the United States; interests of the enemy at heart; defender of the Kaiser and his darling people; your hearts are reeking with disloyalty; and a safeblower is to be preferred.

CONNELLY

I am sorry to see you get mixed up with commies; they are just trying to use you; Commies are persons who hide behind the Bill of Rights and the Constitution and would destroy the very document and the Government it rests upon; and the Communist Party is an illegal conspiracy to overthrow the Government of the United States.

ORMENTO

"Big John, Joe B. They are the junk pushers"; The Trial Judge was obviously dominated throughout the trial by suspicion that the defendants and their counsel were plotting to cause a mistrial: "Your Motion For a Mistrial is Denied * * * it is obviously a put-up job" *In front of Jury* (5890); Codefendant Salvatore Panico jumped into the Jury Box as the Judge ascended the Bench, pushing the jurors in the front row and screaming. "Big John" the record shows without question was Ormento (416, 1608 1627, 5659). The severest sentence of all defendants—40 years imprisonment and $20,000 fine, when the only evidence against Ormento was that of a paid Government informer who testified he would lie if his fear was great enough.

When Judges of the deservedly monumental prestige of Judge Lloyd McMahon counsel a departure from accustomed modes of proof or procedure in criminal litigative procedures against the interests of defendant, it would be ill-behooving for any defense lawyer to try to minimize the revered authority against which he presumes to pit himself in an application for ultimate review by this High Court. We, counsel for petitioner in the present certiorari application, are scarecely able to express the sense of hesitation which we feel in asking this Court to do what we think needs to be done in this case, that is, to restore the Federal law of adhering to the provisions of Title 28 §144. We therefore feel obligated to call upon this Court to redess what appears

to us to be a grievance of due process and fair trial that endangers the entire fabric of federal law enforcement in Section 2255 petitions and affidavits of bias and prejudice pursuant to Title 28, Section 144.

We respectfully submit that his Honor, Judge Lloyd McMahon, should have disqualified himself from participating in any proceeding in connection with this Section 2255 Petition because (a) the Affidavit of Bias and Prejudice pursuant to Section 144, and (b) from all the foregoing it appears that Judge McMahon is of necessity of "material witness" within the meaning of 28 U.S.C. 455. See also *United States v. Re* (1967, C.A. 2, N.Y.) 372 F.2d. 641, cert. den. 388 U.S. 912.

It is with great surprise that counsel received notice of the respondent Trial Judge's intention to question the motives and manner behind counselor's Certificate of Good Faith.

At the bottom of page 45 the Court discusses the requirements of the Certificate of counsel of record stating that the Affidavit of Bias and Prejudice is made in good faith. On page 46 the Trial Corut comments upon the fact that the trial counsel in 1962—Herbert S. Siegal Esq., and petitioner's appellate counsel, Jacob Kossman, Esq., did not join in a Certificate of Good Faith on behalf of Ormento, and states that present counsel, William C. Erbecker, Esq., has filed a Certificate of Good Faith, and the Trial Court further comments that present co-counsel, Lawrence Waldman, Esq., being a member of the Bar of this Court, does not join in the Certificate nor was he counsel of record for petitioner upon the trial or upon the appeal. The Trial Court comments further:

> "This is a significant defect in the motion to disqualify. It is obvious that such counsel are in no position to make a meaningful certificate of good faith. Nor are they as likely to use the care and restraint in certifying good faith as would otherwise be the case were their employment not directly related to the filing of the certificate.

"Counsel of record," as used in the statute, means an attorney at law admitted to the bar of this court. This requirement of the statute is for the purpose of assuring the court that the affidavit is made in good faith through the certificate to that effect made by one who is a sworn officer of the court and regularly admitted as an attorney to practice at the bar of the court. The requirement is not technical. It is one of the essential requirements of the statute. It is founded on the assumption that a member of the bar of the court will not indulge in reckless disregard of the truth and attest to the good faith and belief of affiant without basis in fact. Counsel of record has an obligation to the court, as well as to his client, and a public duty to aid the administration of justice to uphold the dignity of the court and respect its authority" (and citing numerous cases).

The rules of the Southern District of New York compel an attorney residing outside the State of New York to associate himself in any cause filed in the above mentioned court with an attorney who is a member of that court in which the cause is pending and upon whom notices may be served.

Lawrence Waldman was retained specifically for this purpose and served in this capacity throughout all proceedings. His sole function was to streamline communications between Mr. Erbecker and the Clerk of the Court. He served strictly in the capacity of monitoring all filing of pleadings and motions and never ventured beyond the bounds impliedly set by serving in this position.

144. Bias or prejudice of judge.—Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term (session) at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (June 25, 1948, c. 646, § 1, 62 Stat: 898; May 24, 1949, c. 139, § 65, 63 Stat. 99.)

As noted above, it is required that a Certificate of Good Faith be signed by the counsel of record when filing an affidavit as the one filed in this case.

Counsel does not quarrel with the fact that the weight of authority requires that the "counsel of record" be an attorney who has been admitted to the bar of the court which the case is being considered.

U.S. v. Onan (C.A. Minn., 1951) 190 F.2d 1 certiorari denied 72 S.Ct. 112, 342 U.S. 869, 96 L.Ed. 654; *Saunders v. Piggly-Wiggly Corp.*, (D.C. Tenn., 1924) 1 F.2d 582; *Ex parte N. K. Fairbank Co.*, (D.C. Ala., 1912) 194 F. 978; *U.S. v. Filboy* (D.C. Pa. 1958) 162 F. Supp. 384; *U.S. v. Garden Homes, Inc.* (D.C. N.H., 1953) 113 F. Supp. 415, affirmed 210 F.2d 281. Mr. Waldman, at the time the pleadings were filed, was a member of the bar for the Southern District of New York. Mr. Erbecker, at that time, was not. Although according to weighted interpretation of the statute, Mr. Waldman was the only attorney who was eligible to sign the certificate of good faith, for him to have done so would have been a violation of the obligation which he owed to the court, the petitioner, and the public to further the administration of justice, uphold the dignity of the court and to respect its authority. *U.S. v. Onan, supra.*

Mr. Waldman was in no position to sign the Certificate of Good Faith. His sole function was to present certain pleadings and address the Trial Court in the Southern District on matters incidental to the present litigation. Mr.

Waldman never interrogated Mr. Ormento and never did read the 10 or 11 voluminous transcripts of the trial in chief which was held in 1962, and Mr. Waldman never did read the various briefs and pleadings filed by the various attorneys representing the various co-defendants in the 1962 trial. Mr. Erbecker did all of these things and, in addition, thereto, interviewed Mr. Ormento on numerous occasions prior to the filing of the instant litigation. The Court's intent in dealing with such can only be interpreted as questioning counselor's purpose and personal integrity. To require Mr. Waldman to sign would have effected fraud upon the Court. Mr. William C. Erbecker is the chief counsel of record in these specific proceedings, and he alone holds the duty of filing a Certificate of Good Faith. *United States v. Hoffa* (D.C. Tenn., 1965)245 F. Supp. 772.

The paradox created here is indeed obvious. On one hand, Mr. Erbecker is required to obtain, in accordance with the rules of the court, local co-counsel. This he did, calling on local counsel only for the purpose of filing motions and pleadings. The Respondent Trial Judge then states that local counsel so obtained should have been a signing party on the Certificate of Good Faith. Counsel is clearly in a dilemma. If Mr. Waldman signs the Certificate of Good Faith he is doing so without sufficient qualification. If he does not sign, at least in the view of the Respondent Trial Judge, 28 U.S.C. §144 has been violated, and the certificate is of no effect.

A charge of prejudice is a most serious matter, and is not to be lightly or frivolously made. Accordingly, counsel should not affix his name without considerable deliberation and investigation as to whether the allegations in the affidavit are true. *U.S. v. Hanrahan* (D.C.-D.C., 1965) 248 F. Supp. 471. Mr. Waldman was in no position to make such an investigation.

The certificate requirement is founded on the assumption that the member of the bar or counsel of record will not indulge in reckless disregard of the truth, and further

attests to the good faith and belief of the affiant. *Mitchell v. Gilboy*, (M.D. Pa., 1958) 162 F. Supp. 384.

In consideration of these cases, and contemplation of the possible sanctions which could conceivably be incurred upon an attorney who falsely signs a Certificate of Good Faith, it is believed that Mr. Erbecker was the only attorney for the petitioner who was qualified to sign the Certificate, and that Mr. Waldman's exclusion was correct and proper.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING THE INTERROGATORIES, MAINLY BECAUSE OF THE TIMELY AND PROPER FILING OF ORMENTO'S AFFIDAVIT OF BIAS AND PREJUDICE UNDER TITLE 28 SECTION 144, AND FURTHERMORE, SAID INTERROGATORIES WERE PROPER BECAUSE OF THE EXPANDED RELIEF IN A SECTION 2255 PETITION AS ENUNCIATED BY THE UNITED STATES SUPREME COURT IN *KAUFMAN V. UNITED STATES*, 394 U.S. 217 AND *HARRIS V. NELSON*, 394 U.S. 286.

The Trial Court's action in dismissing the Interrogatories on motion of the Government was erroneous in the light of the expanded relief cognizable under a Section 2255 Petition. *Kaufman v. United States*, 394 U.S. 217 is an example where the Supreme Court held; *inter alia*, that failure to to appeal from a conviction did not deprive a Federal post-conviction Court of power to adjudicate the merits of the constitutional claims.

This is an unusual case and the issues in this case are unique in that the trial court assumed and continued assumption of jurisdiction despite the proper filing of a petition of Bias and Prejudice pursuant to Title 28 Section 144. We therefore feel constrained to quote from *Harris v. Nelson*, *supra*, which we deem to be applicable in the case at bar.

> "At any time in the proceeding, when the court considers that it is necessary to do so in order that

a fair and meaningful evidentiary hearing may be held so that the court may properly 'dispose of the matter as law and justice require,' either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law.' 28 U.S.S. §1651.

"we do not assume that courts in the exercise of their discretion will pursue or authorize pursuits of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the 'usages and principles of law.' "

The interrogatories filed in this cause were purposeful, meaningful, and relevant and germane to the issues, and by their very nature could have been of inestimable value not only to the petitioner but also the successor judge in arriving at a fair and just determination of the issues herein. The court erred in striking the interrogatories and in continuing its assumption of jurisdiction when the record conclusively shows that the provisions of Title 28, Section 144 were followed with the utmost exactitude.

CONCLUSION

For the reasons stated, THE PETITION FOR WRIT OF CERTIORARI should be granted.

Respectfully submitted,

WILLIAM C. ERBECKER
129 East Market
Hornblower Building
Indianapolis, Indiana

Counsel for Petitioner,
John Ormento

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK DIVISION

JOHN ORMENTO, *Movant*	)	
vs.	)	CIVIL NO.
UNITED STATES OF AMERICA, *Respondent.*	)	

TO: United States Attorney
Second District of New York
Foley Square
NEW YORK, New York

INTERROGATORIES

Pursuant to the prescriptions enunciated by the United States Supreme Court in *Kaufman v. United States*, 394 U.S. 217, the petitioner, John Ormento is filing and propounding the following Interrogatories, numbered 1 to 39 inclusive, as shown below, and you are hereby notified to answer same under oath, positively and without evasion the said Interrogatories within 20 days of the time from the date of service upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure. These Interrogatories shall be deemed continuing so as to require supplemental answers if you obtain further information between the time the answers are served on the petitioner's counsel and the time of the hearing:

Interrogatory Number One:

State whether the Government has any basis for believing, on the basis of past records or present recollection of any of its agents, that John Ormento, or his trial counsel or any agent of John Ormento cooperated during the trial of the above-captioned cause with any co-defendant for purposes of creating grounds for a mistrial.

Interrogatory Number Two:

If the answer to the immediate preceding interrogatory is negative, state whether the Government intends to dispute in any way the claim of John Ormento that the conclusion that responsibility for the misconduct of his co-defendants during his trial cannot justly be ascribed to him as it was in prior proceedings.

Interrogatory Number Three:

If there is an answer to the immediate preceding interrogatory, and if it is affirmative, state the reasons for the said intention and the basis for the said dispute.

Interrogatory Number Four:

If the answer to Interrogatory number one is affirmative, state whether the said basis is contained in past records or in present recollection of Government agents or both.

Interrogatory Number Five:

If the answer to the immediate preceding Interrogatory is to the effect that the said basis is contained in past records or both past records and present recollection of Government agents, designate the type of records which are involved and name the person or agency which has custody of the said records.

Interrogatory Number Six:

If the answer to Interrogatory number four is to the effect that the said basis is contained in the present recollection of Government agents or both past records and present recollection, name that agent whose present recollection is involved.

Interrogatory Number Seven:

If there is an answer to Interrogatory number five, state the substance of the pertinent information which the said records contain.

Interrogatory Number Eight:

If there is an answer to Interrogatory number six, state the substance of the pertinent information which the said recollection discloses.

Interrogatory Number Nine:

If the answer to Interrogatory number one is affirmative, name all co-defendants with whom the Government believes it can link the petitioner from the standpoint of causing or trying cause grounds for mistrial during his trial.

Interrogatory Number Ten:

If the answer to Interrogatory number one is affirmative, state whether it was the petitioner or agents of the petitioner that the Government believes to have acted to cooperate with other defendants to procure a mistrial or both.

Interrogatory Number Eleven:

If the answer to the immediate preceding Interrogatory is to the effect that it is believed by the Government that the petitioner acted through agents or that he acted per se

as well as through agents, name the agents whom the Government believes to have been involved.

Interrogatory Number Twelve:

State whether the Government has any basis for believing on the basis of past records or present recollection of any of its agents, that John Ormento or his counsel or any agent of John Ormento took direct action for purposes of creating grounds for mistrial during his trial.

Interrogatory Number Thirteen:

If the answer to the immediate preceding Interrogatory is affirmative, state whether the said basis is contained in past record or in the present recollection of Government agents or both.

Interrogatory Number Fourteen:

If the answer to the immediate preceding Interrogatory is to the effect that the said basis is contained in past records or both past records and present recollection of Government agents, designate the type of records which are involved and name the person or agency which has custody of the said records.

Interrogatory Number Fifteen:

If the answer to Interrogatory number thirteen is to the effect that the said basis is contained in the present recollection, name the agents whose present recollection is involved.

Interrogatory Number Sixteen:

If there is an answer to Interrogatory number fourteen, state the substance of the pertinent information which the said records contain.

Interrogatory Number Seventeen:

If there is an answer to Interrogatory number fifteen, state the substance of the pertinent information which the said recollection discloses.

Interrogatory Number Eighteen:

If the answer to Interrogatory number one is affirmative, state whether the Government bases its contention on the information of persons who are not Government agents.

Interrogatory Number Nineteen:

If the answer to the immediate preceding Interrogatory is affirmative, state the substance of the pertinent information which the said witness will provide insofar as this can be done without revealing the identity of the witness and state whether the witness will be produced at any hearing on the merits in this matter.

Interrogatory Number Twenty:

If the answer to Interrogatory number one is affirmative, state whether any of the Government's belief is based upon matters of the record in this cause and, if so, cite the pertinent portions of the record.

Interrogatory Number Twenty-One

State whether the Government has any basis for believing or knowing that any of the United States Marshals present and/or connected with said trial in 1962 had any conversation with any of the jurors prior to or during said trial with reference to the trial itself.

Interrogatory Number Twenty-Two:

State whether the Government has any basis for believing or knowing that any of the jurors in said cause were escorted to or from the trial, to their homes or any other place.

Interrogatory Number Twenty-Three:

If the answer to the foregoing Interrogatory number twenty-two or twenty-one is in the affirmative, give the name, address and the present assignment of the said Marshal and/or agent.

Interrogatory Number Twenty-Four:

State whether the Government has any basis for believing or knowing the contents of any or all of the Court's sealed exhibits which were sent up to the Second Circuit of Appeals of the trial of said cause.

Interrogatory Number Twenty-Five:

State whether the Government has any basis for believing or knowing that there were any wire taped conversations of John Ormento pertaining to or relating to said trial.

Interrogatory Number Twenty-Six:

State whether the Government has any basis for believing or knowing the whereabouts of the chief Government witness Smith, between the first trial which ended in a mistrial and the beginning of the second trial.

Interrogatory Number Twenty-Seven:

State whether or not the Government has in its possession any reports, records or files of former agent Rowan who testified for the defense in the trial which resulted in Ormento's conviction.

Interrogatory Number Twenty-Eight:

If the answer to the foregoing is in the affirmative, state the nature and contents of the same and where they are now being kept.

Interrogatory Number Twenty-Nine:

Does the Government have in its possession any copies of the minutes made by the then Solicitor-General made in a reply brief in the petition for certiorari in 1962, filed on behalf of petitioner Ormento?

Interrogatory Number Thirty:

State whether the Grand Jury which returned the indictment in the instant cause originally returned in John Doe indictment which was subsequently used to issue a warrant for movant John Ormento.

Interrogatory Number Thirty-One:

State whether a John Doe warrant was originally issued and served on movant John Ormento.

Interrogatory Number Thirty-Two:

State whether or not the Government has in its possession any evidence that John Ormento was a fugitive in the instant case at the time of the return of the indictment herein.

Interrogatory Number Thirty-Three:

If the answer to the foregoing Interrogatory is in the affirmative, state concisely and briefly what evidence the Government had and what agencies or agent has possession of the same at the present time.

Interrogatory Number Thirty-Four:

State whether or not the District Attorney trying said cause, or any of his agents assisted in the preparation and/or completion of the presentence investigation and/or report in any way.

Interrogatory Number Thirty-Five:

If the answer to the foregoing Interrogatory is in the affirmative, state the name and present address of said District Attorney and/or assistant District Attorneys.

Interrogatory Number Thirty-Six:

If the answer to Interrogatory number thirty-four is in the affirmative, state whether or not any of the following Government agencies assisted the District Attorney or any of his deputies or assistants, namely: (a) Internal Revenue Service, (b) Federal Bureau of Investigation, (c) Narcotic Agents, (d) any other Governmental or State agencies of any kind.

Interrogatory Number Thirty-Seven:

If the answer to the foregoing Interrogatory is in the affirmative, state the names and addresses of the various Governmental agents, attaches, employees or representatives of the aforesaid agencies, and the respective governmental agents or agencies wherein any records or reports are kept concerning the same.

Interrogatory Number Thirty-Eight:

State whether or not movant John Ormento made a request for dental medication or treatment during the progress of the second trial, and if so, the exact nature, extent, time, place and conversations with which Government agents, if any, were had by Ormento, and the exact circumstances under which said request for dental or medical treatment was requested by Ormento.

Interrogatory Number Thirty-Nine:

If the answer to the foregoing Interrogatory is in the affirmative, state precisely what occurred, where it occurred,

the exact time and place, and with what Government agent or representative, if any, it occurred with, and any other germane information connected therewith.

Respectfully submitted,

WILLIAM C. ERBECKER
Attorney for Movant Petitioner
B. L. Hornblower Building
129 East Market Street
Indianapolis, Indiana 46204
Telephone: 634-6236

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October, one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,

Circuit Judges.

John Ormento,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

I.

THIS HONORABLE COURT ERRED IN HOLDING AND DECIDING THAT THE ORDER OF THE DISTRICT COURT DENYING THE SECTION 2255 PETITION WAS JUSTIFIED BECAUSE OF THE ALLEGED RELITIGATION OF ALL THE MATTERS ALLEGED IN SAID PETITION

It will serve no useful purpose to rehash all the matters alleged in the original brief filed in this Honorable Court, and in addition thereto the same matters were alleged in an Emergency Petition for Writs of Mandamus and Prohibition and the Renewed Petitions for Writs of Mandamus and Prohibition.

On oral argument this Court made an open pronouncement from the bench that the matters alleged in Ormento's petition to vacate and set aside his judgment of conviction were litigated and relitigated and that the Court was fully aware of the factual situation in the case because of the numerous appeals taken by other codefendants in the 1963 trial.

It is respectfully suggested to the Court that *all* of the matters alleged in Ormento's Section 2255 petition were not fully litigated and therefore the ruling of the District Court denying the same and the action of this Court affirming the order of the District Court is error.

II.

THIS HONORABLE COURT ERRED IN AFFIRMING THE ORDER TO THE DISTRICT COURT DENYING AND DISMISSING THE AFFIDAVIT OF BIAS AND PREJUDICE FILED PURSUANT TO TITLE 28, SECTION 144

Again counsel respectfully urges the Court that this Affidavit of Bias and Prejudice has been before this Court on two previous occasions and it would serve no useful pur-

pose to set out any portions thereof, much less discuss the same.

It is the considered but respectful opinion of counsel that when the provisions of Title 28, Section 144 have been complied with, as Ormento attempted to do in the case at bar, that nothing is left for the Court before whom the same is filed but to grant the same and have the case assigned to another judge.

Again, we respectfully say that the trial court cannot be a judge in his own case with reference to the alleged bias and prejudice and in support thereof we quote a pertinent excerpt of *In the Matters of Lee Roy Murchison and John White, Petitioners*, 349 U.S. 133, a synopsis of that case is as follows:

> Michigan law authorizes any judge of its courts of record to act as a so-called one-man grand jury, he can compel witnesses to appear before him in secret to testify about suspected crimes. A Michigan judge, so acting as a grand jury, charged two witnesses with contempt, one for refusal to answer any questions, and the other for perjury; he ordered the witnesses, to appear at a public trial after reasonable notice of the charges against them, tried them in open court, and convicted and sentenced them for contempt. The issue before the Supreme Court was whether due process was violated in that the same judge presiding at the contempt hearing had also served as the "one-man grand jury" out of which the contempt charges arose.
>
> In an opinion by Justice Black, six members of the Supreme Court held that the proceeding described above violated due process, since a trial by a judge who has an interest in the outcome is not a fair trial.

The pertinent portion of the opinion we think is relevant to the case at bar is as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires

an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temption to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 US 510, 532, -1 L. Ed 749, 758, 47 S. Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L. Ed. 11, 75 S. Ct. 11."

Under the provisions of Title 28, Section 144, the trial court should proceed no further if the Affidavit of Prejudice and Bias is complete, valid and proper on its face Furthermore, the written opinion of the trial court stating that the certificate of good faith by counsel is improper is simply not borne out by the record because as counsel attempted to argue before this Court, counsel did have and does now have ten volumes comprising 10,000 pages of the original trial which he read. Furthermore, counsel brought into Court with him about one-half dozen other briefs filed by other attorneys for other defendants in the appeals to this Court from the 1963 trial as well as petitions for certiorari as well as the portion of the Section 2255 Petition appealed to this Court by Appellants Panico and DiPietro. In addition thereto, counsel conferred with Petitioner John Ormento at least fifteen to twenty times prior to the filing of the Section 2255 Petition and the Affidavit of Bias and Prejudice. Therefore, counsel respectfully maintains that only he could make the certificate and not co-counsel Mr. Lawrence Waldman because Mr. Waldman to

the knowledge of counsel never did talk or even correspond with Petitioner Ormento.

It is therefore respectfully urged that the Court reconsider its judgment affirming the orders of the District Court be in all things reversed.

Respectfully submitted,

/s/ William C. Erbecker
WILLIAM C. ERBECKER

LAWRENCE WALDMAN
Counsel for Petitioner

WILLIAM C. ERBECKER
129 East Market, Suite 901
Indianapolis, Ind. 46204
Telephone: 634-6236

LAWRENCE WALDMAN
111 West 57th Street
New York, N. Y. 10019
Telephone: COL5-5385

APPENDIX "D"

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of December, one thousand nine hundred and seventy-one.

John Ormento,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

It is hereby ordered that the motion made herein by appellant
by notice of motion dated December 1, 1971, for leave to file a petition for rehearing, be and it hereby is granted.

It is further ordered that the petition is DENIED.

J. EDWARD LUMBARD

PAUL R. RAYS

JAMES L. OAKES

Circuit Judges

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 11 1972
MICHAEL RODAK, JR., CLERK

No. 71-1166

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN ORMENTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1166

JOHN ORMENTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1962 petitioner and other defendants were convicted by a jury in the United States District Court for the Southern District of New York of illegal importion of heroin, in violation of 21 U.S.C. (1964 ed.) 174, and of conspiracy, 18 U.S.C. 371. Petitioner was sentenced to imprisonment for forty years and fined $20,000. The court of appeals affirmed *sub nom United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied, *Ormento* v. *United States*, 375 U.S. 940.

On December 20, 1970, petitioner moved to vacate his sentence, propounded interrogatories to the United States Attorney, and moved to disqualify Judge MacMahon, who had presided at his trial. Judge MacMahon refused to disqualify himself, granted the government's motion to strike the interrogatories, and on the basis of the files and records, denied the motion to vacate sentence. While appeal was pending, petitioner, on July 27, 1971, filed in this Court a "Motion for Leave to File Petition for Writ of Mandate to the Honorable Lloyd MacMahon, Judge United States District Court for the Southern District of New York". This motion was denied on October 12, 1971 (No. 71-139). The court of appeals thereafter rejected the appeal. The matters sought to be raised on that motion are now presented in the present petition, which was properly denied by the court below.

1. Judge MacMahon correctly refused to disqualify himself from hearing the motion to vacate sentence. A primary purpose underlying the enactment of 28 U.S.C. 2255 was to enable the trial judge, because of his familiarity with the proceedings and his ability to supplement the record, to pass upon motions for collateral relief. *United States* v. *Hayman*, 342 U.S. 205; *United States* v. *Smith*, 337 F. 2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916. The claimed hostility of Judge MacMahon was an issue on direct appeal and was decided against petitioner. *United States* v. *Bentvena*, 319 F. 2d 916, 932-933, certiorari denied, 375 U.S. 940. The court concluded (p. 933):

> We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbursts. * * *

Three of petitioner's co-defendants sought unsuccessfully to have Judge MacMahon recuse himself on collateral attack on their convictions. See *Mirra* v. *United States*, 379 F. 2d 782, 788 (C.A. 2), certiorari denied, 389 U.S. 1022; *Panico and DiPietro* v. *United States* 412 F. 2d 1151 (C.A. 2), certiorari denied, 397 U.S. 921.

2. In addition to his application for collateral review petitioner propounded thirty-nine interrogatories to the United States Attorney. These included whether the government had a basis for believing that petitioner or his trial counsel cooperated with any co-defendant during trial for the purpose of creating a mistrial, whether the government had any basis for believing that any Marshal communicated with the jurors prior to or during the trial and a variety of other questions (Pet. App. A 1-9). The interrogatories were properly stricken since this is not a case in which the district court was confronted with a claim which deserved a hearing or established a *prima facie* case for relief. *Harris* v. *Nelson*, 394 U.S. 286, 290, 300.

3. Petitioner's motion for relief under 28 U.S.C. 2255 alleged that 21 U.S.C. 174, under which petitioner was charged, was unconstitutional on its face

and as applied to him because "it contemplates a criminal intent, by the taking of an overt act, innocent in itself" (Pet. 12), abridges the rights of free speech and is void for vagueness; that count 8 (the conspiracy charge) of the indictment failed adequately to inform him of the accusation against him; that petitioner was prejudiced by being tried together with co-defendant Panico, who was engaged in conduct he was powerless to prevent; that the court was hostile toward defendants in the trial of the case; that illegally obtained evidence whose nature is not described was admitted; that the charge to the jury was improper in that it failed to state that knowledge of illicit importation of narcotics was a necessary element of the conspiracy charge and in that it failed to mention the testimony of a government witness which allegedly contradicted the testimony of principal government witness Smith; that the sentence was cruel and unusual; and that the evidence did not sustain petitioner's conviction (Pet. 4-13).

The constitutionality of 21 U.S.C. 174 is firmly established. *Yee Hem* v. *United States*, 268 U.S. 178; *Turner* v. *United States*, 396 U.S. 398. The additional grounds for holding it invalid suggested by petitioner are insubstantial. The claim that the indictment was defective constitutes no ground for collateral attack. *Cummins* v. *United States*, 368 F. 2d 819 (C.A. 9). The claims of court hostility and of prejudice resulting from being tried together with co-defendant Panico were dealt with on direct appeal (319 F. 2d 929-933). The propriety of the instruc-

tions, not a ground for collateral attack, was also fully considered on the direct appeal (319 F. 2d 938-940), as was the sufficiency of the evidence (319 F. 2d at 923-924, 927-928). The sentence was within statutory limits and, in the circumstances, was appropriate. Petitioner's motion was therefore properly denied on the basis of the files and records in the case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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